IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LANDEN CURTIS HARVILL, Appellant.	No. 33195-1-II UNPUBLISHED OPINION

QUINN-BRINTNALL, C.J. — Landen Harvill shot and killed Jasen Pate during a dispute about drug money. A jury convicted Harvill on: Count I, second degree murder under alternate theories of intentional or felony murder, and Count II, first degree unlawful possession of a firearm.[1] At trial, Harvill claimed that Pate attacked first, so Harvill grabbed a firearm from Pate's pants and shot him in self-defense. But eyewitnesses to the shooting testified that Harvill armed himself before Pate entered the house, and that Pate was leaning on the refrigerator when Harvill shot him. Harvill appeals, arguing that (1) his counsel was ineffective for failing to object when the court refused to give an instruction defining "actual danger not necessary" self-defense; and (2) the prosecutor committed misconduct by vouching for three State's witnesses during his closing argument. Finding no error, we affirm.

[1] Harvill stipulated to a prior conviction for second degree assault, a conviction that formed the basis of the unlawful possession of a firearm charge.

FACTS

Background

Harvill purchased methamphetamine several times from Pate and owed Pate money. Pate's friends "taxed" Harvill for the debt by going to Harvill's home and taking his personal property. Late one night, Pate, his girl friend, Kiann Torrence, and an acquaintance, Aaron Kennedy, were dealing drugs. The group went to Holly Hoyt's apartment to purchase cocaine from her. Pate went inside while Torrence and Kennedy stayed in the truck. Apparently unbeknownst to Pate, Harvill was inside.

When Harvill learned that Pate was coming to the apartment, he ducked into the kitchen. Pate also went into the kitchen. At trial, Harvill testified that Pate started a fight by insulting and repeatedly hitting him. Harvill pulled a gun from Pate's pants and shot him. But Jenny Passfield, who was in the next room, and D.J. Braaten, who stood in the kitchen during the shooting, both testified that there was no fight and that Pate did nothing to provoke the shooting. Pate died moments after Harvill shot him.

Procedure

The State charged Harvill with Count I, second degree murder with a firearm enhancement, and Count II, first degree unlawful possession of a firearm. The prosecution argued that Harvill committed felony murder predicated upon second degree assault or committed intentional murder when he shot and killed Pate. Harvill claimed he acted in self-defense.

Jury Instructions

Harvill proposed several jury instructions, including 11 *Washington Pattern Jury Instructions: Criminal* 16.07, at 189 (2d ed. 1994):

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger.
>
> Actual danger is not necessary for a homicide to be justifiable.

Clerk's Papers (CP) at 40. The attorneys and Judge James J. Stonier resolved issues of jury instructions in chambers.

The trial court gave several self-defense jury instructions, including two generalized instructions. In pertinent part, Instruction No. 16 read:

> It is a defense to a charge of **intentional murder in the second degree** that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the lawful defense of the slayer when:
>
> (1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury; [and]
>
> (2) the slayer reasonably believed that there was imminent danger of such harm being accomplished.

CP at 69. Similarly, Instruction No. 17 read in part:

> It is a defense to a charge of **felony murder in the second degree** that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured and when the force is not more than is necessary.

CP at 70. Defense counsel did not object on the record to any of the self-defense instructions.

The trial court did not give the "actual danger not necessary" instruction Harvill's counsel proposed, but defense counsel did not object on the record to its omission.

Closing Arguments

In closing, the prosecutor summarized each State witnesses' testimony, linked the testimony with corroborating physical or testimonial evidence, and then argued that the jury

should believe the State's witnesses. The prosecutor introduced this theme by stating, "Well, ladies and gentlemen, at this point, [the witnesses are] your witnesses. . . . You can believe them 100 percent, 20 percent, ten percent, or not at all." 4 Report of Proceedings (RP) at 738.

Before discussing Braaten's testimony, the prosecutor said, "[E]very critical thing that he says is corroborated and is corroborated by the physical evidence and the Defendant's word." 4 RP at 744. After linking Braaten's testimony with the physical evidence at the crime scene, the prosecutor continued, "Now how would D.J. Braaten know what the physical evidence in this case would show? The truth is always easy to tell. And the truth can always be corroborated if there are other truths. And these are truths." 4 RP at 746. Later, the prosecutor repeated, "[H]e told the truth, because the truth is easy to tell, and it can be corroborated by other evidence." 4 RP at 747.

Regarding Torrence's testimony, the prosecutor said, "The question is, is she a truth-teller. I submit that she is." 4 RP at 748. He then discussed how Torrence's testimony was corroborated with physical and testimonial evidence. The prosecutor also discussed the credibility of Thomas Roman, stating that Harvill had tried to purchase a gun from him a few weeks before the shooting as follows: "[He] didn't come out with the big lie because he told the easy truth. And the truth, ladies and gentleman, is always easy to tell. And in this instance, the truth is, [Harvill] was looking for a gun, and he went to Thomas Roman." 4 RP at 750. Toward the end of the argument, the prosecutor reiterated the jury's role, saying, "[Y]ou shouldn't rely on our argument as evidence." 4 RP at 762.

Defense counsel did not object to these comments during closing argument.

Conviction and Appeal

The jury found Harvill guilty as charged and the trial court imposed a standard range sentence of 430 months. Harvill appeals, urging us to reverse because (1) his counsel provided ineffective assistance by not objecting when the trial court refused to give the "actual danger not necessary" jury instruction; and (2) the prosecutor committed misconduct by vouching for the witnesses' credibility during argument.

ANALYSIS

Effective Assistance of Counsel

Harvill argues that his counsel was ineffective for not objecting on the record after the trial court rejected the "actual danger not necessary" jury instruction.[2] Br. of Appellant at 12. Harvill's sole argument is that the trial court's self-defense jury instructions misstated the law of self-defense and were prejudicial.[3] We disagree.

To show ineffective assistance of counsel, an appellant must prove both (1) that his attorney's performance was deficient; and (2) that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). But we begin with a strong presumption that defense counsel is competent. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If counsel's trial conduct was a legitimate trial strategy or tactic, it cannot provide a basis

[2] Harvill's brief mischaracterizes the facts. He assigns error to his attorney's failure to *request* the actual danger jury instruction. But his attorney did request the instruction. Harvill also insists that his attorney never objected to the omission of this instruction, but the facts are not so clear. The parties met in camera, where his attorney may have objected, but she did not object on the record when the court gave her the opportunity to do so.

[3] Br. of Appellant at 12-13, citing *State v. Irons*, 101 Wn. App. 544, 550, 4 P.3d 174 (2000), for the proposition that a jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.

for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975

P.2d 512 (1999). To satisfy the prejudice prong of the ineffective assistance of counsel claim, the appellant must show that counsel's performance was so inadequate that there is a reasonable probability that but for the deficient performance the result would have differed, thereby undermining this court's confidence in the outcome. *Strickland*, 466 U.S. at 694.

Moreover, it "is not error" for a judge to reject a requested instruction "when the subject matter is adequately covered in the court's other instructions." *State v. Etheridge*, 74 Wn.2d 102, 110, 443 P.2d 536 (1968). We have previously held that a defendant is not prejudiced when a trial court rejects the "actual danger not necessary" instruction. *State v. Kidd*, 57 Wn. App. 95, 99, 786 P.2d 847, *review denied*, 115 Wn.2d 1010 (1990). We reasoned that the words "reasonable belief" in the jury's general self-defense instruction is sufficient: "The use of force upon or toward the person of another is lawful when used by a person who *reasonably believes* that he is *about to be injured* by someone." *Kidd*, 57 Wn. App. at 99 n.4 (emphasis added). Thus, because defense counsel is free to argue that a defendant's reasonable belief of danger, even if mistaken, justifies self-defense, no prejudice results from a trial court's refusal to give an additional "actual danger not necessary" instruction similar to the one Harvill requested. *Kidd*, 57 Wn. App. at 99.

In contrast, our Supreme Court has ruled that a general self-defense instruction with the clause "[t]here *was* imminent danger of such harm being accomplished" was alone insufficient to apprise the jury of the law of self-defense because "reasonable belief" did not modify "imminent danger." *State v. Studd*, 137 Wn.2d 533, 539, 546, 973 P.2d 1049 (1999). In *Studd*, the court held that, absent an additional "actual danger not necessary" instruction, the jury was misinformed about the law of self-defense. 137 Wn.2d at 546.

But here, the trial court instructed the jury that Harvill could be found to have acted in self-defense if he "reasonably believed that there was imminent danger of such harm being accomplished," or "reasonably believe[d] that he [was] about to be injured." CP at 69-70 (Instruction Nos. 16 and 17). Thus, unlike in *Studd*, the term "reasonably believed" modifies "imminent danger" and "about to be injured." Here, the trial court's general instructions adequately apprised the jury of the law of self-defense and an "actual danger not necessary" instruction would have been duplicative. Harvill could not have been prejudiced by his counsel's tactical decision not to object to the trial court's refusal to give a duplicative instruction. More importantly, Harvill's testimony negated any argument that Harvill reasonably, but mistakenly, believed Pate was violent.

Mistake was not an issue in this case. Harvill testified that he killed Pate because Pate repeatedly assaulted him. Harvill did not assert that he killed Pate because of a generalized, possibly mistaken, fear that Pate would injure him in retaliation for his debt. Harvill does not assign error to his counsel's failure to *argue* the mistake theory nor, in light of his testimony, could he reasonably do so. Mistake was not a viable theory in Harvill's case, and the rejection of a jury instruction predicated on a reasonable mistake for which no evidence was presented could not have prejudiced Harvill. Given Harvill's testimony, his attorney had a legitimate reason to not object to the trial court's refusal to give the "actual danger not necessary" instruction.

Accordingly, we find no error.

No Prosecutorial Misconduct

Second, Harvill argues that the prosecutor committed misconduct by vouching for the credibility of the State's witnesses, Braaton, Torrence, and Roman. We disagree.

It is misconduct for counsel to clearly express his personal opinion as to the credibility of a witness, but counsel is not barred from analyzing the apparent credibility of witnesses during closing argument. *State v. Allen*, 57 Wn. App. 134, 142, 788 P.2d 1084 (1990); *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983). There is no misconduct unless it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing personal opinion. *State v. Price*, 126 Wn. App. 617, 654, 109 P.3d 27, *review denied*, 155 Wn.2d 1018 (2005); *Papadopoulos*, 34 Wn. App. at 400. We review a prosecutor's closing remarks in the context of the total argument. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *Price*, 126 Wn. App. at 654.

Here, there is no misconduct. The prosecutor argued that the jury should find the witnesses' testimony credible. He did state that: (1) Braaten's testimony was composed of "truths"; (2) Torrence was a "truth-teller"; and (3) Roman "told the easy truth." 4 RP at 746, 748, 750. But in each instance, when taken in context, the prosecutor was asking the jury to *find* the witnesses' testimony credible because it was corroborated by other physical or testimonial evidence, evidence that the prosecutor laid out for the jury during closing argument. The "truth" statements above are not expressions of the prosecutor's personal opinion. They are requests for the jury to find the testimony credible by drawing inferences based on a comparison of the evidence. Thus, they are proper argument.

Accordingly, we affirm Harvill's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

HOUGHTON, J.

VAN DEREN, J.